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Supreme Court, U.S.
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No. 97-535

In The

Supreme Court of the United States

October Term, 1997

JEFFREY B. HOPKINS,

Petitioner,

vs.

KEN MARKS FORD and PCA SOLUTIONS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the First District Court of Appeal of the State of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can an employer properly rely on a statutorily mandated false representation defense to a workers' compensation claim, where the employee presented fraudulent written information regarding physical condition, prior injuries, and current disabled status in response to employer's inquiries about such, and where such employer inquiries may or may not have been in compliance with the Americans With Disabilities Act?

PARTIES TO THE PROCEEDING

The following is the parent corporation of Respondent Ken Marks Ford, Inc.: Sonic Automotive, Inc. There are no nonwholly owned subsidiaries of Ken Marks Ford, Inc. Respondent PCA Solutions, Inc., is now known as Humana Workers' Compensation Services, Inc., whose parent company is Humana, Inc. There are no nonwholly owned subsidiaries of Humana Workers' Compensation Services, Inc.

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JURISDICTIONAL ISSUES

Petitioner asserts that this Court has jurisdiction to review this case because the decision of the Florida District Court of Appeal, First District, conflicts with the decision of the Minnesota Supreme Court in *Huisenga v. Opus Corp.*, 494 N.W. 2d 469 (Minn. 1992) with the implication that these are conflicting state court decisions that have decided an important federal question. This is incorrect. Neither the pending Florida decision nor the Minnesota decision has decided an important federal question. The Minnesota decision in *Huisenga* involves an interpretation of the Minnesota Human Rights Act.

Moreover, the Petitioner asserts that this Court has jurisdiction to review because the decision of the Florida District Court of Appeal, First District, conflicts with a decision of the United States Court of Appeals, First Circuit in *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (1st Cir. 1995). That is an incorrect statement. There is no conflict between these decisions.

Finally, the Petitioner asserts that this Court has jurisdiction to review because the decision of the Florida court affects an important question of federal law. However, the purported important question of federal law framed by the Petitioner has no basis in the facts of this case as the Petitioner's workers' compensation benefits were not denied because of the results from an employer inquiry into his medical history, but rather his benefits were denied because of his intentional, fraudulent misrepresentations. Furthermore, the Florida statute in issue makes no reference to enabling an employer to make an inquiry into an employee's medical history, whether lawfully or otherwise.

STATUTORY PROVISIONS INVOLVED

Respondent includes the following additional statutory provisions:

The Americans with Disabilities Act, Title I, 42 U.S.C. § 12111 provides, in pertinent part:

> (5) Employer. (A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.
>
> (8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

REASONS FOR DENYING THE WRIT

1. Petitioner has failed to raise the issue now presented before this Court in the trial court below. As a result, Petitioner has absolutely failed to preserve the issue or to establish any form of relevant record activity sufficient for purposes of appellate consideration or review of the issue.

The Petitioner demonstrates his perception of a supposed conflict between the Americans With Disabilities Act (ADA) and Fla. Stat. § 440.15(5)(a) (Supp. 1994) in the following issue statement excerpt as presented in the Petitioner's Amended Reply Brief before the Florida District Court of Appeal, First District, as follows:

> Can an employer, pursuant to state law, deny a workers' compensation claim based on the employee's misrepresentation of the existence of a disability on an employment questionnaire, when the ADA precludes the employer from asking the questions to the employee concerning his disability.

Petitioner poses this conflict in an attempt to demonstrate a potential statutory imposition mandating preemption of the Florida statute by the superior federal legislation.

It is clear from the record, however that Petitioner simply never raised any such issue at the trial level. At no time did the Petitioner or the Employer/Carrier present evidence or argument as to why or why not the ADA was applicable to this case. There is no record evidence suggesting whether or not the questions posed by the Employer to Petitioner ever ran afoul of the ADA, invoking its protections, or whether the Employer's questions may have been otherwise justified under a legitimate business purpose pursuant to 42 U.S.C. § 12112(d)(4).

There is also no record evidence demonstrating that Petitioner is properly classified as a "qualified individual" for purposes of invoking ADA protections, pursuant to 42 U.S.C. § 12111(8). Failure to generate record evidence of entitlement to ADA protections as a "qualified individual" pursuant to the definition in 42 U.S.C. § 12111(8) precludes such individual from asserting ADA protections. *Hensley v. Punta Gorda*, 686 So. 2d 724, 726 (Fla. 1st DCA 1997). A "qualified individual" is:

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8).

The *Hensley* Court clearly stated that if an ADA claimant cannot perform the essential functions of the job, such Claimant is not entitled to protection of the ADA. *Hensley*, 686 So. 2d at 726. The court explained that disability under the Florida worker's compensation law presupposes that a claimant is unable, by reason of her injuries, to successfully perform all of the functions of her job. *Id.* The court further reasoned that the fact that appellant was consequently seeking disability benefits plainly excluded her from the definition of "qualified individual". *Id.*

Petitioner clearly misrepresented his ability to perform the job supplied to him. As a result of heavy lifting, as required by Petitioner's position, Petitioner was injured and attempted to claim disability benefits. Under a *Hensley* analysis, Petitioner is thus presumed to have been unqualified for the job which caused further injuries to his preexisting disability, and Petitioner has put forth no evidence on the record to rebut such

presumption, nor has Petitioner ever asserted that he would come within the scope of the definition of "qualified individual" for purposes of ADA protections.

Petitioner's suggestion that the Employer has already taken the position that Petitioner was a "qualified individual" for ADA purposes (*see* Petition at pg. 13) has no merit or basis in law or fact. As a foundation for this misguided assumption, Petitioner attempts to rely upon Employer's statement that, had it known Petitioner were disabled, it would have attempted to accommodate him. (*see* Petition at pg. 13). This statement by Employer does not prove Employer's recognition of Petitioner as a disabled and qualified individual in any way, but rather only demonstrates that, had Petitioner truthfully and properly informed Employer of his disability, and had Employer had the opportunity to recognize Petitioner as disabled, Employer would have attempted to accommodate him in accordance with the law.

Furthermore, no evidence or argument was put forth as to why or why not Fla. Stat. § 440.15(5)(a) was or was not contrary to and preempted by the ADA under the facts of this case. While the Petitioner is correct that the judge of compensation claims (JCC) would not have had the authority to invalidate the state statute, Petitioner should have raised the preemption issue at trial for purposes of preliminary determination of whether the ADA was applicable as well as whether Fla. Stat. § 440.15(5)(a) was inconsistent with the ADA so as to necessitate preemption in this particular case. If this proper procedure had been followed, the record would have been appropriately developed for purposes of appeal and review, where this Court could possibly have addressed the trial court's treatment of the statutory issues as well as any potential constitutional questions arising from such treatment. In the matter at hand, however, the record is essentially a blank slate, simply void of the various sorts of evidence necessary for a proper consideration of the issue presented by Petitioner.

Additionally, it is well established that Petitioner's failure to raise the issue now before the court in the trial court below properly functions to bar such issue from further consideration on appeal or review. Failure to properly preserve an issue in the trial court below is fatal to any further attempt at review of such issue. *Sunland Hospital/State of Florida v. Garrett*, 415 So. 2d 783 (Fla. 1st DCA 1982). *See also Oakley v. East Lake Drywall*, 641 So. 2d 515 (Fla. 3rd DCA 1994) (holding that claimant's failure to raise an issue of application of a workers' compensation statute before the judge of compensation claims was therefore not properly raised for the first time on appeal.)

Florida courts do, however, recognize a very narrow exception to the *Sunland* rule requiring preservation of issues for review purposes. In order to qualify for avoidance of the preservation requirement, the issue raised on appeal must involve the facial constitutionality of the statute in question. *Sasso v. Ram Property Management*, 431 So. 2d 204 (Fla. 1st DCA 1983). The issue raised on appeal must be strictly constitutional in nature, not a creature of statutory interpretation. *Id.* at 207. The *Sasso* court further limited its exception to *Sunland* by requiring that any issue demonstrating the facial unconstitutionality of a section of workers' compensation law and utilizing the appellate court as a court of first resort must be shown to be actually ripe for adjudication. *Id.* at 208.

It is upon *Sasso* which Petitioner relies in pursuing review of the unpreserved issue now before this Court, yet at no time has Petitioner demonstrated that Florida workers' compensation statute § 440.15(5)(a) is the type of facially unconstitutional statute contemplated by the *Sasso* court, nor has the issue as presented before this Court been properly generated by the facts in the case at hand to justify a determination of its ripeness for review, as will be discussed in the paragraphs below. Additionally, the *Sasso* court, while permitting some issues to

technically be presented for the first time on appeal, clearly recognized that failure to raise an issue in the court below would most likely result in an insufficient record, thus barring review of the issue in any case. *Sasso*, 204 So. 2d at 208. In fact, the Florida District Court of Appeal, First District, specifically cited *Sasso v. Ram Property Management* in its per curiam citation decision denying Petitioner's appeal and affirming the holding of the trial court below.

Clearly, Petitioner has never properly preserved the issue now before this Court for purposes of further appellate consideration or review as required by Florida law. Petitioner's attempt to raise such issue for the first time in the Florida appellate court was a fatal procedural impropriety, effectively barring further consideration under these circumstances, and resulting in failure to generate a record in the court below suitable for review of such issue in any case. Furthermore, Petitioner has not demonstrated that the Florida statute in question is facially unconstitutional in nature, and has thus failed to satisfy the narrow exception to mandatory preservation of issues which would otherwise have made such procedure appropriate.

Petitioner has alternatively suggested on page 12 of his petition to this Court that it was, in fact, the Employer who raised the ADA issue at hand by stating that Petitioner misrepresented his physical condition at the time of employment. This suggestion is completely unfounded, for there is no basis in law demonstrating that an employer's assertion of a misrepresentation defense to an injured workers' demand for undeserved workers compensation benefits automatically functions to trigger an application of the provisions of the ADA.

2. Even if this Court determines that there are in fact sufficient materials before the court to permit a proper and

thorough review, and decides to overlook Petitioner's blatant procedural improprieties which would otherwise bar further consideration of the issue, a careful reading of the federal question of law posed by Petitioner, after a thorough review of the record facts in the matter, will clearly demonstrate that no such federal question has been generated by the facts in the matter at hand, or from litigation of the matter in the courts below. The facts in this case simply do not warrant nor do they support a discussion of the issue Petitioner has presented to this Court. The first portion of Petitioner's improperly posed federal question is as follows:

> Whether the Americans with Disabilities Act prevents employers from inquiring into an employee's medical history and using the results of the inquiry to deny the employee worker's compensation benefits.

The case before us, however, is not a situation in which the Petitioner responded to questions set forth in a job application process, and Employer, based upon Petitioner's truthful answers, attempted to deny Petitioner worker's compensation benefits discriminatorily as a result of his admittedly disabled status, in contravention with ADA regulations. This is the factual scenario that would lead to a proper formation of the issue presented by the Petitioner. Rather, the case before us is one in which Petitioner took it upon himself to intentionally provide fraudulent information concerning his physical condition and ability to perform work to his Employer, and Petitioner's own false statements functioned to exclude him from worker's compensation benefits by triggering the Florida statutory safeguard against written fraudulent misrepresentation during the employee placement process, Fla. Stat. § 440.15(5)(a). Petitioner addresses the appropriateness of this state statute in the second portion of his improperly posed federal question to this Court as follows:

> . . . and whether the Americans With Disabilities Act prevents a state from passing a law allowing the employer to make such an inquiry. (The phrase "such an inquiry" refers to the questions employer asked of Petitioner regarding his health and prior injury history as part its routine pre-placement activities).

Again, Petitioner's question is simply not demonstrative of the factual occurrences established in the case at hand, or of the provisions of the state statute in question, or of the actions of the Employer. Clearly, no portion of the language comprising Fla. Stat. § 440.15(5)(a) expressly or impliedly permits an employer to make inappropriate or illegal inquiries into job applicants' or employees' prior injuries or disabled status, as Petitioner's question would suggest. In fact, there is simply no language whatsoever that in any way determines what sorts of inquiries may or must be made, or when, or what sorts of inquiries are or are not appropriate. Plainly, the Florida Legislature was aware of the ADA at the time of the drafting of current Fla. Stat. § 440.15(5)(a), *circa* 1994, and would not have prepared the language in a manner that would run afoul of the provisions of a federal regulatory scheme, directly or otherwise. Petitioner simply cannot demonstrate that the Florida Legislature has drafted a statute that, as Petitioner's question to this Court suggests, "allows" employers to make illegal inquiries in contravention with the provisions of the ADA.

The Petitioner's core question as to Fla. Stat. § 440.15(5)(a) (*see* Petition at pg. 13) is:

> whether such statute, as interpreted by the Florida courts, causes prejudicial treatment to disabled persons or those perceived as disabled and operates to prevent such persons from competing in the work place, generating an artificial, arbitrary, and unnecessary barrier to employment.

In fact, § 440.15(5)(a) is entirely incapable of being either discriminatory or prejudicial in its operation, but rather precludes *all* fraudulent statements, from disabled *or* non-disabled persons, in the course of the employment application process. In the matter at hand, the results of inquiries made by the Employer of the Petitioner, after his hiring, were simply not used in a discriminatory fashion, as contemplated by the ADA, to bar the Petitioner from rightfully deserved workers' compensation. In fact, any form of *truthful* answer, either yea or nay, to the Employer's questions would not have resulted in barring Petitioner from disability benefits. Here, the Petitioner was denied workers' compensation as a result of his own fraudulent, intentional misrepresentations to his Employer, and was thereby injured by his dishonesty, not his disabilities or any truthful admission or representation thereof to his Employer. It was not the substance of his answers, but rather their fraudulent nature, that resulted in Petitioner's denial of benefits. In fact, as a result of Petitioner's misrepresentations, the Employer was not even aware of Petitioner's disabilities at the time of his job placement determination, and could therefore not have acted prejudicially based upon such unpossessed knowledge.

Furthermore, nothing in the Americans With Disabilities Act expressly precludes or prohibits states from formulating statutes in an effort to shield employers from the results of fraudulent representations set forth by an employee in contemplation of securing or maintaining employment or insurance benefits, nor should the ADA be utilized as a tool to substantiate or excuse such fraudulent misrepresentations during the formation of an employment contract, effectively resulting in a reward for such illegal conduct.

It is well established that the ADA prevents employers from improperly obtaining an employee's or job applicant's health information, and utilizing such information concerning the

individual's disabilities in a prejudicial manner to the individual's detriment. It is equally established that Fla. Stat. § 440.15(5)(a) merely functions to prohibit employees and job applicants from submitting fraudulent written statements to an employer to the effect of fraudulently maintaining or establishing workers compensation benefits to which such individuals are not properly entitled.

The express provisions and intended applications of these statutes plainly are not mutually exclusive, neither are they in direct functional conflict as the Petitioner would suggest. Although the phraseology of Petitioner's stated question does in fact demonstrate a hypothetical conflict, neither the language of the statutes nor the fact scenario in the case at hand permits such a formulation for consideration. Petitioner's suggested conflict is utterly baseless and wholly fabricated by his inaccurate formulation of the issue as Petitioner has presented it.

3. Petitioner has undeniably failed to preserve an ADA-related issue for purposes of appeal or review, failed to establish a sufficient record for review in the court proceedings below, and failed to present before this Court accurately constructed, logically derived, factually supported issues ripe for review. This Court may, however, in its wisdom and graciousness, decide to rephrase, reconstruct, or redesign the issue before it as one reasonably derived from the facts of this case. If this Court does, in fact, decide to stretch its discretionary powers of review in such a manner, Respondent urges that the Court adopt the following, accurate construction of the occurrences in this matter:

> Can an employer properly rely on a statutorily mandated false representation defense to a workers' compensation claim, where the employee presented

> fraudulent written information regarding physical condition, prior injuries, and current disabled status in response to employer's inquiries about such, and where such employer inquiries may or may not have been in compliance with the Americans With Disabilities Act.

If it does in fact please the Court to adopt this proper demonstration of statutory interaction based on the facts of the case at hand, and to consider a review of such issue in light of Petitioner's suggestion that the situation before the Court requires federal preemption of Florida misrepresentation defense statute § 440.15(5)(a), then it is the duty of Respondent to bring to the attention of this Court the case of *Caldwell v. Aarlin/ Holcombe Armature Company*, 481 S.E. 2d 196 (Ga. 1997), which Petitioner has failed to discuss.

In *Caldwell*, the Georgia Supreme Court has already decided essentially the same issue generated by the facts of this case as articulated clearly and correctly above, holding that an employer could in fact rely on a false representation defense to a workers' compensation claim, even if the questions that the employer posed violated ADA provisions prohibiting *pre-offer* inquiries and examinations regarding disabilities. *Id.*

In *Caldwell*, the claimant/appellant completed a job application form containing several questions about his general health, including the question "[h]ave you ever been treated for back problems?" Claimant answered "no", despite the fact that he had injured his back severely at a prior job and had received disability and medical benefits for the injury. The claimant subsequently injured his back again in the course of performing at his new job, and again demanded workers' compensation. The employer, who had relied upon claimant's statements to hire and place claimant, asserted the *Rycroft* false representation

defense to his workers' compensation claim (Georgia's *Rycroft* defense being the equivalent to Florida's *Martin v. Carpenter* misrepresentation defense to employees' and job applicants' false representations, now codified at Fla. Stat. § 440.15(5)(a) and serving as the subject of this controversy). *See Georgia Electric Co. v. Rycroft*, 378 S.E. 2d 111 (Ga. 1989); *Martin Company v. Carpenter*, 132 So. 2d 400 (Fla. 1961).

The *Caldwell* court upheld the *Rycroft* defense as being consistent with public policy, promoting truthfulness in the employment process and upholding laws voiding contracts procured by and through fraud. *Caldwell*, 481 S.E. 2d at 197. The court noted that the defense was consistent with the requirements of the Georgia Subsequent Injury Trust Fund (the equivalent of Florida's own Special Disability Trust Fund), which allows employers with knowledge of a worker's disability to access the fund, thereby encouraging the employment of disabled persons by protecting employers from excess liability when a worker's injury merges with a preexisting permanent impairment. *Id.*

The *Caldwell* court further determined that the *Rycroft* misrepresentation defense to workers' compensation claims was not in conflict with, nor should it be preempted by, the ADA. *Id.* at 196-9. The court explained that, under the *Rycroft* defense, an employer is not required to utilize any particular type of job application in order to assert the defense, and that the ADA does, in fact, expressly permit covered employers to make inquiries into applicants' or employees' abilities. *Id.* at 197. The court reasoned that such inquiries into the employee's or applicant's abilities or physical condition do not automatically violate the ADA, and thus a *Rycroft*-type defense may thus properly arise in instances where a job applicant misrepresents his physical abilities, despite the provisions of the ADA. *Id.* at 198.

The *Caldwell* court pointed out, as a further demonstration of the *Rycroft* defense's harmonious existence with ADA regulations, that such defense functions as a completely independent employer protection, extending to all employers and all varieties of job application processes, whereas ADA protections, much more narrow in scope and application, only arise in factual situations involving "covered employees", defined by 42 U.S.C. § 12111(5), as to specifically prohibited types of questions, directed toward "qualified individuals", and resulting in the prejudicial manipulation or application of such information to the detriment of the "qualified individual". *Id. See also* 42 U.S.C. § 12111, 12112.

In further support of its holding, the *Caldwell* court reasoned that the ADA already adequately

> provides avenues individuals can pursue when an employer violates the ADA provisions on . . . inquiries and examinations. Misrepresenting the truth on an improper job application is not one of the avenues provided by the ADA and the ADA does not authorize or countenance the use of knowing and wilful misrepresentations by employees in response to improper questioning by an employer.

Caldwell, 481 S.E. 2d at 198.

The court further explained that denying the employer the use of the *Rycroft* defense did not "reward" the employer for its use of improper job application questions or shield it from possible ADA penalties, yet disabling the *Rycroft* defense would function as a "reward" to the claimant for his intentional misrepresentations which led to his ill-gotten employment and subsequent re-injury. *Id.* Such an inappropriate "reward" can only lead to the proliferation or encouraged utilization of

fraudulent statements in the job application process, a wholly unsuitable result.

Respondent urges that this Court recognize the fair, logical reasoning and resulting holding of the *Caldwell* court to be good law, and that, in light of such holding, this Court recognize the absence of a true conflict warranting the preemption of Fla. Stat. § 440.15(5)(a) by the ADA. This Court has itself stated that, under the supremacy clause, state law can be preempted by federal law in three ways: when Congress in express terms states that federal law supersedes relevant state law; where federal law implicitly preempts state law because the scheme of federal regulation is sufficiently comprehensive to make reasonable inference that Congress left no room for supplementary state regulation; and even when federal law does not entirely occupy an area of law, state law is preempted to the extent that it actually conflicts with federal law, making compliance with both laws a physical impossibility, or demonstrating the state la as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

In light of the plain language, legislative history, legislative intent, and actual practiced application of both the ADA and Fla. Stat. § 440.15(5)(a), it is the Respondent's contention that even the properly reconstructed rendition of Petitioner's issue simply has not demonstrated the type of legislative conflict or incompatible statutory interaction contemplated by this Court to warrant preemption of the state statute, as demonstrated by the holding in *Caldwell*.

Petitioner cites a Minnesota case, *Huisenga v. Opus Corp.*, 494 N.W. 2d 469 (Minn. 1992) as supposedly persuasive authority for his position encouraging preemption of the Florida

statute by the ADA. This case, however is easily distinguished on the law and facts, and is technically, fatally off-point. The *Huisenga* court only addressed the issue of whether a false representation defense to a workers' compensation claim violated the Minnesota Human Rights Act (MHRA), which prohibits all forms of pre-employment inquiries into a job applicant's disabilities. The *Huisenga* court entirely failed to address the ADA, but rather indulged in a Title VII federal anti-discrimination analysis/comparison incorporating discussion of bona fide occupational qualifications. Furthermore, *Huisenga* arose from pre-employment inquiries made to a job applicant, which are absolutely prohibited by the MHRA due to the vast potential for prejudicial treatment of such information by employers, whereas the case at hand deals only with post-employment placement questions to an already hired employee, a situation much less ripe for the potentially prejudicial manipulation of information concerning employee disabilities. Additionally, such post-employment inquiries are, to some extent, expressly permitted by the ADA in 42 U.S.C. § 12112(d)(4). The Florida District Court of Appeal, First District, properly declined to arrive at the same conclusion as the Supreme Court of Minnesota in the factually and legally distinct *Huisenga* case, despite Petitioner's urgings.

CONCLUSION

For the foregoing reasons, including Petitioner's failure to preserve any ADA issue for review, failure to generate a record sufficient to conduct such review, failure to articulate a reviewable issue as properly derived from the facts and law in the matter at hand, failure to substantiate the existence of a statutory conflict mandating federal preemption, and failure to demonstrate legally and factually supportive authority for either Petitioner's original, incorrect issue or Respondent's properly stated formulation of a potential issue, this case does not merit further review and the Petition should be denied.

Respectfully submitted,

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